IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 24TH JULY 2007 / 2ND SRAVANA 1929

T.R.C.No.134 of 2003

T.A.NO.179/2002 OF THE KERALA SALES TAX APPELLATE TRIBUNAL, ADDL. BENCH-I, ERNAKULAM, ORDER DATED 30.4.2002.

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REVISION PETITIONER/APPELLANT:-

M/S. GIRIPAI JEWELLERS,
M.G.ROAD, ERNAKULAM,
REPRESENTED BY ITS PARTNER,
S.VISVESWARA PAI.

BY ADV. SRI.K.M.V.PANDALAI.
SRI.P.U.MATHEN.

RESPONDENT/RESPONDENT:-

THE STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
SECRETARIAT, THIRUVANANTHAPURAM.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD ON 24/07/2007, ALONG WITH T.R.C.Nos.138/2003 & 139/2003, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

T.R.C.Nos.134, 138 & 139 of 2003

Dated, this the 24th day of July, 2007

ORDER

H.L.Dattu, C.J.

Since common questions of law are involved in all these revision petitions they are clubbed together, heard and disposed of by this common order.

(2) The assessment years in question are 1994-95, 1995-96, 1996-1997. The Tribunal by its order in T.A.Nos.179 of 2002, 180 of 2002 and 181 of 2002 dated 30th April, 2002 has rejected the appeals filed by the assessee. That is how the assessee is before us in these tax revision cases.

(3) The questions of law raised by the assessee are as under:

"**(a)** Section 5A of the KGST Act provides as follows:-

> "**5A. Levy of purchase tax:-** Every dealer who, in the course of his business, purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable under [Sub-sections (1), (x), (3), (4) or (5) of Section 5] and either,-
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> (a) consumes such goods in the manufacture of other goods for sale or otherwise; or
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> (b) use or disposes of such goods in any manner other than by way of sale in the State; or
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> (c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or

> commerce; shall, whatever be the quantum of the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for the year at the rates mentioned in Section 5.
>
> (2) Notwithstanding anything contained in sub-section (1), a dealer other than a casual trader or agent of a non-resident dealer purchasing goods, the sale of which is liable to tax under section 5, shall not be liable to pay tax under sub-section (1) if his total turnover for a year is less than two lakhs rupees".

A reading of Section 5A extracted above would go to show that the said section will apply only in cases no tax is payable under section 5. Bullion is taxable under section 5. That is why Government had to issue a notification exempting the State Bank of India from paying tax under section 5. Thus but for notification under Section 10 tax is payable under section 5. In other words, it is absolutely incorrect to say that bullion in the instant case is not taxable under Section 5. In this beyond the matter is the Tribunal justified in law in holding that purchase of bullion by the petitioner is liable to tax under section 5A?

(b) The notification under consideration in the decision of this Hon'ble Court in Deputy Commissioner (Law) Vs. Supreme Boards [6 KTR 374], which was relied on by the Tribunal, was SRO-968/80 which provided for exemption from payment of sales tax on the sale of goods manufactured by small scale industries. The sale was exempted when effected by small scale industries who ever may be the purchaser. However in Annexure-II notification sale of bullion by State of Bank of India and Non Resident Indians is exempted only when the sale is to registered dealers in jewellery. That being the case, is the Tribunal justified in Law in holding that the decision of this Hon'ble Court in Supreme Board's case (6 KTR 374) is squarely applicable to the facts of this case?

(c) In Annexure-II notification it has been stated in the explanatory note that the exemption on sale of bullion by NRIs and State Bank of India is ordered in order to promote jewellery export from Kerala. Export of jewellery from Kerala is effected only by the registered dealers in jewellery. When tax is levied under section 5A on the purchase of bullion by registered dealers from State Bank of India, the registered dealers stands to loose the benefit of Annexure-II notification. Is the Tribunal justified in law in holding that Annexure-II notification is not intended for the benefit of jewellery exports? Is not the decision of the Tribunal against the object for which Annexure-II notification was issued

by the Government? Is the Tribunal justified in law in holding that the object behind Annexure-II notification is to discourage unauthorised purchase of primary gold and thereby to give quality advantage to the exporters?

(d) Under section 10 of the KGST Act, Government have powers only to reduce rate of tax or exempt any goods or class of goods from levy of tax when sold by any specified class of persons. If the decision of the Tribunal is followed, the effect will be that by giving exemption to the seller by the Government, the purchaser will become liable to pay tax. It will in effect result in shifting of point of levy from sale to purchase. Has the Government got powers to shift the point of levy of tax under section 10 of the KGST Act? View from that perspective, does the decision of this Hon'ble Court in Supreme Board's case (6 KTR 374) lay down the law correctly? Is it not liable to be reviewed?

(e) In the decision of the Hon'ble Supreme Court in State of Tamil Nadu Vs. Kandaswamy (36 STC 191) and of this Hon'ble Court in Malabar Fruit Products Company Ltd. vs. Sales Tax Officer (30 STC 537), the circumstances under which section 5A of the KGST Act and the corresponding provision under the TNGST Act will be attracted in clear terms. The circumstances which were considered in those decisions are not the circumstance of exemption granted by the Government, but they were circumstances which were beyond the control of the Government as a result of which tax was not payable by the sellers. Is the Tribunal justified in law in holding that even a situation created by the Government will be a circumstance contemplated under section 5A of the KGST Act to levy tax under section 5A?

(f) Exactly identical notifications granting exemption from payment of tax to sellers on sale of goods to specified class of persons have been issued by the Government. One such notification is SRO-1727/93. In Schedule VI of the said notification sale of certain goods to certain dealers are notified as exempted. For example sale of dyes and chemicals to coir/handloom industries for use in the manufacture of coir/handloom products is exempted. But nowhere in the State the coir/handloom industries which purchase dyes and chemicals in a circumstance in which no tax is payable by virtue of the notification is assessed to tax under section 5A. Therefore the principle regarding applicability of section 5A is applied in a highly discriminatory fashion. Is the Government justified in law in applying different principles regarding levy of tax in identical situations?"

(4) The questions of law raised by the assessee are no more debatable in view of the decision of this Court in the case of *M/s.Mayilvahanam Marketing Shoranur* v. *Addl. Sales Tax Officer, Ottappalam* in O.P.No.34485 of 2000 disposed of on 10th July, 2007.

(5) Following the observations made in the aforesaid decision, the questions of law raised by the assessee require to be answered against the assessee and in favour of the revenue.

All pending stay petitions are dismissed.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

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